

1 UNITED STATES DISTRICT COURT
2 EASTERN DISTRICT OF MICHIGAN
3 SOUTHERN DIVISION
4 — — —

5 UKRAINIAN FUTURE CREDIT UNION,

6 Plaintiff,

7 vs.

Case No. 17-11483

8 SEIKALY, et al.,

Hon. Matthew F. Leitman

9 Defendants.
10 _____/

11 MOTION FOR PRELIMINARY INJUNCTION

12 BEFORE THE HONORABLE MATTHEW F. LEITMAN
13 United States District Judge
14 600 Church Street
15 Flint, Michigan
16 Wednesday, September 6, 2017

17 APPEARANCES:

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1 Flint, Michigan

2 Wednesday, September 6, 2017

3 at about 9:05 a.m.

4 — — —

5 (Court and Counsel present.)

6 THE CASE MANAGER: All rise.

7 The United States District Court for the Eastern
8 District of Michigan is now in session, the Honorable
9 Matthew F. Leitman, United States District Judge, presiding.

10 You may be seated.

11 The Court calls Case No. 17-11483, Ukrainian Future
12 Credit Union vs. Seikaly, et al.

13 Counsel, please state your appearances for the
14 record.

15 MR. BIGELOW: Good morning, Your Honor. For the
16 record, James Bigelow appearing on behalf of plaintiff.

17 THE COURT: Good morning.

18 MR. COLLIER: Your Honor, my name is Trent Collier,
19 and I represent William Seikaly and the law firm of Seikaly,
20 Stewart & Bennett.

21 THE COURT: Good morning. Welcome to both of you.
22 Please be seated.

23 MR. COLLIER: Thank you.

24 THE COURT: First of all, let me thank you for
25 making the effort to join me up here in Flint. I don't know

1 if I moved up here before or after this case was filed, but I
2 always appreciate it when folks take the effort to join me up
3 here.

4 We are here this morning for argument on the motion
5 for preliminary injunction that Mr. Bigelow filed.
6 Mr. Bigelow the floor is yours. I ask only that you come to
7 the podium and speak clearly, please.

8 MR. BIGELOW: Thank you, Your Honor.

9 Your Honor, I know you have had an opportunity to
10 review the briefs. I will just make a few brief --

11 THE COURT: Can you pull that microphone down just
12 a little bit? The acoustics in here are not great.

13 MR. BIGELOW: Better?

14 THE COURT: Please, yes.

15 MR. BIGELOW: Your Honor, the first point I would
16 make in regards to the plaintiff's motion is that the
17 defendants aren't going to be prejudiced at all in this case.
18 They have indicated that, well, there is an appeal pending
19 and they need these documents for the appeal. The three
20 documents --

21 THE COURT: Let me go kind of in order on the
22 injunction factors and start with the merits, if I might,
23 Mr. Bigelow.

24 With respect to the federal claim, what section of
25 the Federal Computer Fraud and Abuse Act are you bringing

1 your claim under? Is it more than one section or is it a
2 single section?

3 MR. BIGELOW: I don't have the section handy,
4 Your Honor, but I would indicate that pursuant to the
5 Furukawa case we are not claiming that there was unauthorized
6 access. We are claiming that there was authorized access
7 beyond the scope of what the defendant was permitted to do.

8 THE COURT: All right. In the Furukawa case I'm
9 holding up, just so you can see it, the authorities that you
10 presented, and you attached a copy of the Furukawa case and
11 you -- and I appreciate -- highlighted for me the section
12 that you wanted me to read.

13 MR. BIGELOW: Yes.

14 THE COURT: In the Furukawa case, Judge Drain, my
15 colleague, was discussing two separate subsections of the
16 Computer Fraud and Abuse Act, subsection (a)(2) and (a)(4),
17 and you highlighted in here -- again I'm holding it up --
18 only his discussion of the elements of subsection (a)(4).

19 Am I to assume then that that's the subsection that
20 you want me to read?

21 MR. BIGELOW: I'm not sure that (a)(4) is -- which
22 section that is, Your Honor.

23 THE COURT: All right. The -- I'm going to read
24 you the part that you highlighted for me so we can all be on
25 the same page here.

1 MR. BIGELOW: Okay.

2 THE COURT: You highlighted for me the following
3 from page 871 of Judge Drain's decision in the American
4 Furukawa case. For the record the citation is 103 F. Supp.
5 3rd, 864, Eastern District of Michigan, 2015.

6 You highlighted for me the following text, quote,
7 to successfully bring an action under the CFAA based on a
8 violation of subsection (a)(4), Furukawa must show that
9 Hossein, one, accessed a protected computer; two, without
10 authorization or exceeding such authorization that was
11 granted; three, knowingly and with intent to defraud; and
12 thereby, four, furthered the intended fraud and obtained
13 anything of value, causing; five, a loss to one or more
14 persons during any one-year period aggregating at least
15 \$5,000 in value.

16 Are those the elements that you are trying to
17 satisfy in your complaint and your motion?

18 MR. BIGELOW: Yes, Your Honor. As well as the
19 other 18 U.S.C. Section 2113, the -- which is set forth in --
20 those issues are set forth in my reply brief.

21 That section was highlighted, Your Honor, in
22 regards to the initial complaint that was filed. The
23 complaint has since been amended, and there are additional
24 claims and additional parties, and we have come upon
25 additional facts that have been set forth in there regarding

1 the actual downloading of the information by Ms. Shibanov.

2 THE COURT: Let me take the subsection (a)(4) of
3 the CFAA claim, if we could, talk about that for a moment.

4 MR. BIGELOW: Okay.

5 THE COURT: One of the elements that Judge Drain, I
6 just -- that Judge Drain mentioned and that you just
7 confirmed for me is at issue here is an element that the
8 defendant act knowingly and with an intent to defraud and
9 that their actions of accessing the computer under this
10 subsection further the intended fraud.

11 What here is the theory of a fraud as opposed to
12 just accessing private information for some non-fraudulent
13 purpose?

14 MR. BIGELOW: Well, basically, Your Honor, the gist
15 of my argument would be that it is illegal conduct.
16 Mr. Seikaly is not supposed to have possession of these
17 documents. They are protected by state law.

18 THE COURT: But he's not alleged to have accessed
19 the computer. As I understand the affidavit you've submitted
20 along with the first amended complaint, the allegation is
21 that Ms. Shibanov -- am I saying that correctly --

22 MR. BIGELOW: Ms. Shibanov.

23 THE COURT: -- Ms. Shibanov accessed the computer;
24 is that correct?

25 MR. BIGELOW: That's the way it appears,

1 Your Honor. We don't know if Mr. Seikaly was able -- if she
2 was able to get access again. We don't think she did beyond
3 February or March of 2013.

4 THE COURT: Well, assume for the sake of my
5 question and just as a hypothetical assumption that you have
6 persuaded me that she accessed the computer remotely as your
7 affidavit says. What is the evidence that, if she accessed
8 in that way, she did it with an intent to defraud your client
9 as opposed to some other intent?

10 MR. BIGELOW: Well, if you take a look at the
11 amended complaint, Your Honor, as well as the reply brief,
12 she kept the documents. When she was working remotely from
13 Oregon, she was supposed to compile information, modify
14 documents is my understanding, send them back to the credit
15 union. She apparently kept them, and it involves hundreds of
16 customers, as far as we know based on the affidavit of
17 Ms. Brown, it involves other documents which were utilized in
18 the state court case which are protected by both state and
19 federal law.

20 THE COURT: All right. But, again, I'm focusing --
21 the one element that I wanted to focus on when I read these
22 elements here is, assume for the sake of my question that
23 Ms. Shibanov -- you say she was in Oregon?

24 MR. BIGELOW: Yes, she was.

25 THE COURT: Assume that I am with you that she

1 accessed the computer remotely, assume I'm willing to take
2 the next step with you that she kept documents that she
3 downloaded, assume the next step, that in the litigation in
4 the state court she used those documents in an effort to
5 prove her claim or, excuse me, to support her defense or for
6 some other purpose. Where is the intent to defraud?

7 When I think of an intent to defraud, maybe I'm
8 being too simpleminded about it, I think about somebody
9 trying to steal something of value from somebody or cheat
10 somebody out of something of value. Even if Ms. Shibarov did
11 exactly what you are suggesting she did, how could I find at
12 this point that she acted with an intent to defraud?

13 MR. BIGELOW: Well, in this case, Your Honor, she
14 did sign several agreements with the credit union indicating
15 that those e-mails are the property of the credit union, they
16 are not hers. She kept them, she kept all of the information
17 and all of the attachments related to the customers, the
18 members, the board members as well, and all of the regulatory
19 documents. It appears as well she was basically preparing
20 monthly and quarterly reports, I think for several months
21 after she left, so she had a contractual obligation not to do
22 what she did.

23 THE COURT: All right. But a contractual
24 obligation, breaching a contract isn't evidence of an intent
25 to defraud. There are all sorts of contractual breaches that

1 aren't fraudulent, right?

2 MR. BIGELOW: Yes, I would --

3 THE COURT: Of course there are. Of course there
4 are.

5 I could think of circumstances under which somebody
6 in Ms. Shibarov's position might take documents from an
7 employer that don't belong to the person in Ms. Shibarov's
8 position and keep those documents but not do it with an
9 intent to defraud, and let me give you an example.

10 For instance, a whistleblower might take the
11 employer's documents and hold them to have evidence of
12 wrongdoing. I'm not suggesting for a moment that
13 Ms. Shibarov is a whistleblower, I have no idea. But what
14 I'm trying to get at, Mr. Bigelow is, even accepting that
15 Ms. Shibarov had the credit union's documents, what is the
16 additional evidence that would allow me to conclude that she
17 had them with an intent to defraud? That's still what I'm
18 wrestling with.

19 MR. BIGELOW: Yeah, and I understand that,
20 Your Honor, and I would think perhaps through discovery we
21 may learn that for the purposes of a preliminary injunction
22 motion, I think, and there is a jury demand in this case. I
23 think that's an issue of fact.

24 THE COURT: All right. Look, come, on. Let's
25 focus in here. At the preliminary injunction stage, it

1 certainly isn't enough to warrant injunctive relief to say
2 that, on one of the elements of the claim, I don't have
3 evidence today but I might get it in discovery. Today you
4 would need to show a likelihood of success on the merits as
5 one of the factors here.

6 And what I'm trying to press on here is that
7 without -- if your claim is under subsection (a)(4), as you
8 have indicated it is, without evidence of an intent to
9 defraud, how could I find a likelihood of success on that
10 claim when I'm looking at that element of the test? That's
11 really what I'm focused on.

12 MR. BIGELOW: Yeah, and I understand your point,
13 Your Honor, there is some uncertainty there, but we are
14 talking about highly confidential information that she had.

15 THE COURT: Okay. Let me move to the point that I
16 think that you were opening with, which is this concept of
17 harm. Maybe you weren't opening with that, but that's what I
18 want to talk about.

19 You know, the most important element of this
20 injunctive relief test is this notion of irreparable harm.
21 When I think about the circumstances of this case and the
22 relief that you've asked for, the first thing I think about
23 is the background of what happened in the Macomb County
24 Circuit Court case and more specifically what the
25 Macomb County Circuit Court's publicly available files look

1 like as we all stand here this morning. And it occurs to me
2 that if at the conclusion of this hearing I was curious, I
3 could drive to the Macomb County Circuit Court and present
4 myself at the clerk's office and say, may I please see the
5 file in the underlying state court case, and I could look at
6 the documents that are in question here because, while
7 Judge Druzinski ordered them redacted she did not order them
8 removed from the files; is that correct?

9 MR. BIGELOW: You could do that I believe.

10 THE COURT: So if I granted you all of the relief
11 that you want today, ordered the Seikaly firm to give you
12 back every copy they have of that document, to purge it from
13 their computer system, all the stuff you've asked for, the
14 primary harm to your client, it seems to me, which is the
15 public having access to the documents, at least in a redacted
16 form, would still be there; isn't that correct?

17 MR. BIGELOW: The files are still there,
18 Your Honor, and that was the first point I was going to make.
19 You know, those three documents which were utilized, they are
20 part of the record and they are going up to the Court of
21 Appeals. My client's big concern is, all of these other
22 documents that Ms. Brown attested to in her two declarations,
23 we don't even know what they are, and Mr. Seikaly admitted on
24 the record that he had a lot of other documents. If we look
25 at a lot of the documents that Ms. Shibanov --

1 THE COURT: Where did he admit on the record that
2 he had a lot of other documents?

3 MR. BIGELOW: He admitted that he had other
4 documents.

5 THE COURT: Where -- can you point me to the
6 specifics? I read the transcripts this morning, and I want
7 to be sure that I'm --

8 MR. BIGELOW: I believe it may be Exhibit 5, and
9 Mr. Seikaly has repeatedly indicated that he would like to
10 have an in-camera hearing. I believe it is page 8. Let's
11 see. But it has been set forth in pleadings, Your Honor, I
12 would submit that to the Court. If you look at top of
13 page 8, he's requesting an in-camera review.

14 THE COURT: No, no, what he says there on the top
15 of page 8, and you highlighted it for me is, if the Court
16 wishes to examine me in camera. He's not -- he's not
17 suggesting -- at least I didn't see it, and it would be
18 helpful for me if you could direct me to it -- that he's
19 sitting on some substantial amount of other documents that
20 are unidentified. If that's in this record it would be
21 helpful if you could show me.

22 MR. BIGELOW: Yeah, I am not sure it is in this
23 transcript, Your Honor. I know it is in one of the
24 deposition transcripts which I could submit to the Court if
25 you wanted to permit me to do that.

1 But he did indicate, when he first utilized the
2 document in the deposition of the chief executive officer,
3 that he had other documents and that he obtained them outside
4 of discovery.

5 THE COURT: Mr. Collier's primary point on the
6 irreparable harm argument is that if his client is -- has a
7 file folder sitting in his office, if Mr. Seikaly has that
8 and it contains these documents and the documents are simply
9 sitting there, what is the irreparable harm to your client of
10 the documents sitting there? As I understand the documents,
11 it is not as if Mr. Seikaly has the only copy of these
12 documents. The documents would be electronically available
13 to your clients, so they are not deprived of the use of the
14 documents. The documents aren't a trade secret, he's not
15 threatening to use them competitively against your client.
16 They are simply sitting in the file at this point as the
17 appeal makes its way through the state court system; is that
18 correct?

19 MR. BIGELOW: Well, as to the three documents that
20 he utilized. But, Your Honor, he's indicated he has other
21 documents. We don't know what they are.

22 THE COURT: All right. But let's assume for the
23 sake of this discussion -- and I'm only making it as an
24 assumption because, as I indicated, I hadn't yet seen
25 evidence of that -- by assume that I agree with you that he

1 has a file, an additional file of documents, and sitting on
2 his -- pretend you and I are in his office and he has a file
3 labeled the documents we all illegally stole from the
4 Ukrainian credit union and got away with it, and, you know,
5 some ridiculous title, and it is just sitting there on his
6 shelf. What's the irreparable harm to your client if the
7 documents are just sitting there?

8 MR. BIGELOW: Well, they are still private and
9 confidential records that he's not entitled to keep.

10 THE COURT: I understand that, but irreparable harm
11 is harm that couldn't be remedied at some point with a dollar
12 award or some point down the road. If the documents are just
13 sitting there, what is the need for this extraordinary
14 preliminary injunction relief?

15 MR. BIGELOW: Well, Your Honor, first of all,
16 you know, one of the documents contains social security
17 numbers. We know they were released to the general public.
18 And there are these other documents, we just don't know what
19 they are, and basically the documents are being held hostage,
20 I think is one way of putting it.

21 THE COURT: Isn't that not an accurate way of
22 putting it? When you hold something hostage, the idea is the
23 person needs to get the hostage back in exchange for
24 something. If I understand the state of the world, the
25 documents are simply sitting on Mr. Seikaly's credenza,

1 nobody is demanding anything in exchange for the documents,
2 they are just -- if they are there, they are just sitting
3 there, right?

4 MR. BIGELOW: But the catch is, Your Honor, they
5 would certainly be used in part of a settlement negotiation
6 regarding the state court case and, it appears, this case as
7 well.

8 THE COURT: Didn't the Seikaly parties win in the
9 state court?

10 MR. BIGELOW: Yes, they did, and the Court closed
11 discovery because I indicated to the Court that we needed
12 these documents back, the unknown documents, and that's when
13 we filed our application for leave to the Court of Appeals,
14 the Court then dismissed the case on summary judgment. Not
15 as a discovery sanction. I think it was actually -- I think
16 that was the Court's intent that it actually was a discovery
17 sanction because -- and there are other issues that I have
18 outlined in my brief regarding what my client felt was unfair
19 regarding the conducting of the deposition of the CEO.

20 THE COURT: Mr. Bigelow, this -- your papers have a
21 feel to them as if you are asking me to undo what you regard
22 as a whole series of errors made by the state system here,
23 your -- you believe and in good faith that Judge Druzinski
24 made a grievous error here in the way she handled this stuff,
25 you believe the Michigan Court of Appeals blew it, you

1 believe the Michigan Grievance Commission blew it, and
2 Mr. Collier says that the Rooker-Feldman doctrine doesn't
3 technically apply here because you are not technically asking
4 me to review the state system, but it certainly has that feel
5 that you're here because the state court, in your view,
6 didn't do the right thing. Is that an unfair view of this
7 case?

8 MR. BIGELOW: Yes, I think so, Judge. I think it's
9 unfair because we were asking the Court to take a look at the
10 ethical rules, the court rules, and to return the documents.

11 Here, it is a violation of federal law quite
12 clearly for Mr. Seikaly and his firm to possess the
13 documents, and that's why we are here before this Court. We
14 took these other avenues, and I know there is a laches claim
15 as well, but that fails because there is no prejudice in this
16 regard. The defendants have been able to keep the documents,
17 they have been able to utilize the ones they want in the
18 state court litigation. These are federally protected
19 documents, they are also protected by state law, and the fact
20 that we moved in two courts to get the records back under
21 ethical rules and under the Michigan Court Rules is a much
22 different situation than coming before this Court and
23 indicating that, hey, these documents are federally protected
24 and we should be able to get them back.

25 THE COURT: What if, to resolve this motion, the

1 Seikaly parties agreed to an order that said until further
2 order of the court, we will keep these documents in a secure
3 file in our office and not disseminate them to anybody else,
4 wouldn't that preclude the risk of harm?

5 MR. BIGELOW: Well, I think we -- as we saw, the
6 documents were misused in the state court. The trouble with
7 an order of that breadth is we still don't know what they
8 have, we don't have the documents back, we don't have any
9 copies, we don't know what they are. And, you know, federal
10 law precludes them from having them. We should get these
11 documents back. He's already had the benefit of utilizing
12 the three documents that he wanted to use in the state court
13 case. He can't use all of these unidentified documents.

14 THE COURT: You talk about using the documents.
15 The state court case is over and -- at the trial court level,
16 it is now before the Court of Appeals. The rules of state
17 appellate procedure are like those of federal in that you
18 can't just generally expand the record, so the idea of
19 Mr. Seikaly making some unfair use of whatever documents he
20 may have in the state court litigation strikes me as highly
21 unlikely. Do you disagree?

22 MR. BIGELOW: I -- at this point do I think he will
23 utilize them? Prob -- I don't know. I don't know what he
24 has in mind. We don't know because we don't know what these
25 documents are, Judge, and that's the big problem. We

1 can't --

2 THE COURT: But what about an order signed by me,
3 if they would agree to it, that says that if and to the
4 extent Seikaly's firm is in possession of documents that
5 Ms. Shibarov downloaded in the manner described in your
6 complaint, if and to the extent they are in possession of
7 those documents, they shall maintain those documents in a
8 secure drawer and not use them for any purpose absent further
9 permission from this Court. Wouldn't that at least put --
10 secure the interests of your client and let us sort through
11 what the facts may show here?

12 MR. BIGELOW: I don't think so, Your Honor. I
13 think we should be holding the documents and --

14 THE COURT: What's -- what is -- why would you
15 perceive that -- I understand where you want to end up in
16 this case, but why would what I'm proposing not be enough to
17 protect your client? If I issue that order and if we learn
18 that Mr. Seikaly or his firm knowingly violated that order,
19 they could be held in criminal contempt. That seems to me to
20 be a pretty serious deterrent.

21 MR. BIGELOW: I think the more efficient ruling
22 would be to give the documents back to my client.

23 THE COURT: Look, I understand that. My question
24 is a very specific one. I totally get what you want. My
25 question is, if I were to do what I just proposed, why is

1 that not enough to protect your clients?

2 MR. BIGELOW: I think there is an issue of trust
3 here, Your Honor.

4 THE COURT: Look, the point is, I am not asking
5 anybody to trust. What I'm saying is I would sign an order
6 of a United States District Court. This is the hypothetical
7 I'm giving you. This is not trust, this is a coercive
8 federal court order that says you are going to do what I am
9 ordering you to do, which is keep the documents in a secure
10 file, as an order of the Court. That's not the old
11 Ronald Reagan trust but verify, that's saying if you don't do
12 it there are people who can enforce federal court orders. So
13 again I'm trying to focus on, what is not enough protection
14 if I were to enter that kind of an order?

15 MR. BIGELOW: I just think it provides more
16 certainty that the documents will not be misused.

17 THE COURT: Okay. Anything else?

18 MR. BIGELOW: Uh --

19 THE COURT: Let me jump in here. My style in oral
20 argument is I ask a lot of questions and I interrupt a lot
21 because if I don't ask the question right away I tend to
22 forget it. What I always like to do at the end is to make
23 sure that I give counsel a chance to kind of take a look at
24 their notes and make sure if there are any points that you
25 want to make that I got in your way of making, please take a

1 moment and share them with me.

2 MR. BIGELOW: I appreciate it. I appreciate that,
3 Your Honor. I have enjoyed the dialogue.

4 I think I have -- I would just make one more point,
5 Your Honor, as far as, I don't think there is any adequate
6 remedy at law. I think the Court should order that the
7 documents be returned so my client can adequately protect
8 their board members' privacy interests as well as their
9 customers.

10 THE COURT: Let me just -- in subsection (a)(4) of
11 the Computer Fraud and Abuse Act, it refers to the defendant
12 obtaining anything of value. The three documents that were
13 part of the state court record that you claim were obtained
14 from the credit union, help me understand what is the value
15 of those things. In other words, it seems to me kind of a
16 classic Computer Fraud and Abuse Act claim is maybe the theft
17 of a trade secret from a computer, and then we know that that
18 has value.

19 But at least the documents we know of here are,
20 you know, rosters of folks at the credit union. And I
21 completely understand your point and respect it that your
22 people don't want that out in the public. I sure wouldn't.
23 So I totally understand and respect that point.

24 But how does -- how could I determine that there is
25 a value, a monetary value to that, that would be at least

1 \$5,000 of what was stolen? In the affidavit that you
2 submitted the \$5,000 refers to legal fees that were paid to
3 you.

4 MR. BIGELOW: Yes.

5 THE COURT: I don't necessarily see that as what
6 the statute is talking about. It talks about the thing
7 obtained having a value.

8 MR. BIGELOW: Well, let's use the example of the
9 social security numbers themselves, Your Honor. Certainly it
10 would be easy enough for someone to obtain a social security
11 number, utilize it in credit card fraud or loan fraud, and
12 obtain \$5,000.

13 THE COURT: So I guess the idea here is that, at
14 least in theory, if Mr. Seikaly were a thief he could sell
15 the social security numbers on some black market for at least
16 \$5,000?

17 MR. BIGELOW: And the other customer information,
18 you know, regarding loans, and -- for example, I think
19 there's mortgage information in there regarding if a
20 five-year balloon is due perhaps that could be used to
21 solicit that customer when their loan is coming due,
22 something along those lines.

23 THE COURT: Okay. Thank you again. Anything else,
24 Mr. Bigelow, that you'd care to share?

25 MR. BIGELOW: Nothing further, Your Honor.

1 THE COURT: Thank you.

2 MR. COLLIER: Good morning, Your Honor. Again for
3 the record, my name is Trent Collier.

4 There are a few points I would like to make, but I
5 suspect I should jump to the key point, which is your
6 question about the order and whether it would solve things to
7 have an order that requires my client to keep these documents
8 in a secure drawer.

9 I think that makes perfect sense subject to two
10 caveats we would like to see in that order. One is that the
11 three documents that were part of the state court trial
12 record can still be used in their redacted form in further
13 state court proceedings. And the other would be that my
14 clients can share documents that they have with their
15 counsel. In the event we get past the 12(b)(6) stage, the
16 plaintiff is going to be asking for copies of those documents
17 and to know what those documents are, and we are going to
18 have to see them.

19 So we would agree to an order that requires my
20 client to keep them in a secure drawer or place of some
21 fashion subject to our right to use the state court documents
22 and counsel's right to see those documents.

23 Subject to that, there are just a few points I
24 would like to make. There is sort of a shifting procedural
25 posture here. When the motion for an injunction was filed,

1 it was based on the complaints that alleged that Mr. Seikaly
2 and his law firm hacked the computers of the credit union.
3 That's what the complaint said and that's what the motion
4 said. We responded to those allegations.

5 Later they filed a new complaint which shows that
6 those allegations are completely false. They do not allege
7 any more that Mr. Seikaly or his firm was involved in hacking
8 any computers. They don't allege that my clients violated
9 the Computer Fraud and Abuse Act. And I think Count 1 of the
10 first amended complaint is addressed only at Ms. Shibanov.

11 So I think that's a problem for the motion as a
12 whole because the motion is directed only to Mr. Seikaly and
13 his law firm and we now know that all of the allegations that
14 were stated in the motion are false. So there is no way that
15 the plaintiffs can establish a likelihood of prevailing on
16 the merits of the complaint that this is based on and the
17 motion and the facts alleged in their brief.

18 Second, I just want to respond, I think at one
19 point Mr. Bigelow might have suggested that we would try to
20 use these documents as leverage in settlement talks, and
21 that's just completely false. We have never done that and we
22 wouldn't do that.

23 Lastly I just want to end with sort of a global
24 point that didn't come out in the briefs, but I think it is
25 important to understand the context of this case.

1 Mr. Seikaly has a duty under Michigan Rule of
2 Professional Conduct 1.6 to maintain the confidences and
3 secrets of his clients, and that extends beyond privilege, it
4 extends beyond work product. He has a duty to maintain those
5 confidences. So the allegation that he's somehow violating
6 his ethical duties is false. In fact, he's fulfilling those
7 duties as best he can.

8 Unless the Court has questions for me, I can yield
9 my time.

10 THE COURT: Yeah, just on a kind of a basic
11 commonsense proposition. Mr. Bigelow has presented a picture
12 here that what happened is Ms. Shibarov stole his client's
13 stuff and gave it to Mr. Seikaly. There is -- I haven't seen
14 any counterevidence -- and perhaps because you were
15 responding to the first version of the complaint and the
16 first motion -- that that's not what happened.

17 If that happened why isn't the -- if somebody stole
18 my stuff I would want it back. Why isn't the right ruling
19 just, you know, boy, I didn't even have to go to law school
20 to figure this one out. When my kids stole something from
21 the neighbor, I didn't ask about irreparable harm of the kid
22 keeping it overnight, I just said give the dang thing back.
23 Why isn't that the right thing here?

24 MR. COLLIER: Well, I mean, it is kind of getting
25 ahead because we haven't had the chance to prove this and

1 plead this, but I think what we are going to show is that --
2 well, first of all, when you look at the new complaint that
3 was filed, they allege that Ms. Shibarov -- I keep saying
4 that wrong -- accessed these files in January of 2013 and
5 then Mr. Bigelow used them in 2015.

6 THE COURT: Mr. Seikaly?

7 MR. COLLIER: I'm sorry, Seikaly, yes. He used
8 them two years later. So they don't have a claim against
9 Mr. Seikaly under the Computer Fraud Act, which is only
10 federal claim here, so they've got to rope him in through
11 some sort of conspiracy. And there is this huge factual gap
12 in their complaint because they have got her accessing these
13 documents while she was employed by the plaintiff and then
14 two years later, according to their complaint, she gave them
15 to her counsel and they were used in the state court. So for
16 12(b)(6) purposes that is the big problem here is this huge
17 factual gap which they don't fill and they can't fill.

18 If I may, but I think -- and I'm getting ahead of
19 myself because I haven't reviewed all of these documents, but
20 what I understand to be the case and what I think we will
21 show is that Ms. Shibarov accessed these documents as an
22 employee and e-mailed them to herself so she could work at
23 home and sent them back to the credit union. She was doing
24 nothing improper. So she had these documents later, but she
25 didn't obtain them through any improper means. She was

1 employed by the credit union.

2 THE COURT: So your -- the theory you anticipate
3 offering is that this wasn't exceeding the permitted access?

4 MR. COLLIER: Exactly. And I'm getting ahead of
5 myself because we haven't had a chance to look at all the
6 documents, but based on what I know now that is going to be
7 our theory.

8 But really that's a theory for the plaintiff -- I'm
9 sorry, not for the Plaintiff -- that's a theory for
10 Ms. Shibarov, who hasn't appeared in this case yet, and the
11 only allegations here concern my client. So I don't think my
12 client needs to prove that he didn't -- or that she didn't
13 access those -- that she accessed those documents improperly.
14 That's for her to prove.

15 THE COURT: What about the -- well, one of the
16 claims is a conversion claim. Isn't -- doesn't the -- and it
17 is a statutory and common law conversion, and it has been a
18 while since I've looked at statutory conversion, but my
19 recollection is that the Michigan conversion statute has two
20 theories of conversion. One, it now, by way of a fairly
21 recent amendment or maybe the past five or ten years,
22 includes common law conversion, but it previously included
23 and continues to cover the person who acts as the fence, the
24 person who receives converted property. So isn't there a
25 claim against Mr. Seikaly for at least the statutory

1 conversion?

2 MR. COLLIER: I don't think there is because it
3 would have to be under the new -- I guess it would be the old
4 section for aiding conversion. I think that's going to
5 require proof beyond the fact that he got these documents
6 from his client two years after she got them. He wasn't
7 involved in her allegedly wrongful conduct.

8 THE COURT: My understanding of this, what I call
9 the old statutory conversion, and I may be wrong -- this is
10 how my dad explained it to me years ago, and he was a lawyer
11 but maybe not a conversion expert -- is that the old version
12 of the conversion statute was targeted at the person that we
13 commonly refer to as the fence, not somebody who did the
14 theft, not somebody who aided and abetted the theft, but
15 somebody who, knowing the theft had happened, received the
16 stolen or converted property.

17 So isn't there at least, even if everything you say
18 about the plaintiff's claim is that Shibanov did the
19 stealing, wouldn't there still conceivably be a claim against
20 Seikaly and his firm?

21 MR. COLLIER: I don't think so for two reasons.
22 The first is, as the Court said, you have to know that the
23 documents have been stolen, and if she obtained these
24 documents in the course of her employment and gave them to
25 her counsel, he did not know that they were stolen because

1 they weren't.

2 The other problem, and this is sort of
3 foreshadowing our new 12(b)(6) motion, is I don't know if
4 Michigan law recognizes conversion based on electronic data,
5 so there's an Erie (phonetic) problem here.

6 Now, Judge Drain's opinion in the Furukawa case
7 does recognize that claim, but it didn't get into this Erie
8 question of whether or not state law even recognizes this
9 claim. I'm still in the middle of doing research, but what I
10 found so far is that New York and California have recognized
11 claims based on electronic data, but a lot of other
12 jurisdictions haven't.

13 THE COURT: Oh, say that conversion is somehow
14 limited to something that's --

15 MR. COLLIER: That it has to be -- and again I'm
16 still in the midst of drafting a 12(b)(6) motion -- that it
17 has to be something tangible or a tangible document that
18 is -- or an intangible that is connected in some form to some
19 tangible right. And courts have said, when you are talking
20 about data that is just kind of fungible data, it is not
21 really a conversion claim, and I don't know if there is a
22 state law case that recognizes this claim, and I think that's
23 a problem.

24 The big question I still have to find the answer to
25 is whether Judge Gershwin Drain's opinion would be binding on

1 this Court --

2 THE COURT: It is not.

3 MR. COLLIER: -- on the question of state law.

4 Right, I kind of think it is not.

5 THE COURT: It's good. You don't need to do any
6 more research on that.

7 MR. COLLIER: Okay.

8 THE COURT: I have the utmost respect for
9 Judge Drain --

10 MR. COLLIER: Yeah.

11 THE COURT: -- he's a tremendous United States
12 District Court judge, but nothing he says is binding on me
13 any more than anything I say is binding on him or any of my
14 other learned colleagues. If the Sixth Circuit says it or
15 the United States Supreme Court, that's a different matter.

16 Now having said that, what Judge Drain says is
17 certainly going to be persuasive with me, and I'm going to
18 pay extremely careful attention because I know the fine work
19 that he does, but there is no doubt that he -- I'm not bound
20 by his decisions nor is he bound by mine.

21 MR. COLLIER: Right. So -- and I'm getting way
22 ahead of myself into our next 12(b)(6) motion -- one of the
23 issues is going to be should this federal court recognize
24 basically a new state law cause of action, and I have not
25 yet -- there may be out there -- but I haven't found yet a

1 state court case that recognizes conversion based on data
2 like this.

3 THE COURT: So the Erie question for me is would
4 the Michigan Supreme Court recognize a conversion claim for
5 data?

6 MR. COLLIER: Yes, and I think that has to be
7 influenced by the Sixth Circuit precedent that says when
8 federal courts are asked to recognize new state law causes of
9 action, they have to be extremely careful and they have to
10 defer essentially to no, that if it is a new cause of action,
11 federal courts are generally required to leave that to state
12 courts, but that's sort a trailer for what is coming.

13 THE COURT: Okay. Anything else?

14 MR. COLLIER: If I could just look briefly at my
15 notes.

16 I don't think I have anything further.

17 THE COURT: All right. Thank you.

18 MR. COLLIER: Thank you.

19 THE COURT: Mr. Bigelow, will you mind coming back
20 up?

21 MR. BIGELOW: Yes, Your Honor, just briefly.

22 THE COURT: Do you mind if I start with my question
23 for you?

24 MR. BIGELOW: Sure.

25 THE COURT: What I want to make sure is that I

1 understand exactly the claims that are being asserted against
2 the defendants that are here today and that are the subject
3 of your motion.

4 MR. BIGELOW: Okay.

5 THE COURT: I think Mr. Collier helpfully directed
6 me -- I had asked you a number of questions about the CFAA,
7 the Computer Fraud and Abuse Act, but the allege wrongdoer in
8 that count of your amended complaint is Ms. Shibarov, and do
9 you agree with that?

10 MR. BIGELOW: I would have to agree with that,
11 Judge.

12 THE COURT: Okay. I mean that seems to me to be
13 fair.

14 So then the question is, what is the claim against
15 Mr. Seikaly? Is it this receipt of converted property claim
16 that I was talking to Mr. Collier about?

17 MR. BIGELOW: Well, it is that, Your Honor, and it
18 is also, as I've set forth in my brief, my reply brief,
19 18 U.S.C. 2113. Certainly he's not entitled to possess this
20 property at all.

21 THE COURT: What is -- just give me one second.

22 All right. With respect to this 18 U.S.C. 2113 --

23 MR. BIGELOW: Yes.

24 THE COURT: -- that's a criminal statute, correct?

25 MR. BIGELOW: Yes, it is, Your Honor.

1 THE COURT: Is there a civil cause of action for --

2 MR. BIGELOW: I don't believe so, Your Honor.

3 THE COURT: All right. Even if that applies, the
4 part that would apply to Mr. Seikaly would appear to be
5 2113(c), which in your words precludes possession of property
6 stolen from a credit union, do you agree with that?

7 MR. BIGELOW: Yes.

8 THE COURT: But that section itself talks about one
9 of the elements being that the receiver of the property knows
10 the same to be property which has been stolen.

11 MR. BIGELOW: Yes.

12 THE COURT: Is there any evidence here on this
13 point that Mr. Collier was talking about that, even if we
14 assume that Ms. Shibarov wrongfully obtained the property, is
15 there any evidence that Seikaly knew that at the time he
16 received it?

17 MR. BIGELOW: There is ample evidence, Your Honor,
18 because Mr. Seikaly in the state court case received the
19 documents that are attached to I guess Exhibit 2 as well as
20 Exhibit 3 to my reply brief, the employee fraud policy, as
21 well as the e-commerce policies indicating that all the
22 e-mails and documents of the credit union are property of the
23 credit union.

24 THE COURT: That may be, but at the -- even if they
25 are property of the credit union, that doesn't mean that

1 Shibanov didn't have a right to be in possession of it,
2 right? I mean, while she is working there some e-mails from
3 the credit union and some files she's certainly free to
4 download, right?

5 MR. BIGELOW: She was free to download them at the
6 time, but she was supposed to return the documents when she
7 worked on them and, you know, after she used them. It
8 appears she hung on to those.

9 THE COURT: But assume that she did hang on to
10 those, simply hanging on to them isn't evidence that she
11 stole them or even hung on to them with a criminal intent. I
12 think somebody would be shocked if they worked for the credit
13 union and left the employment of the credit union and forgot
14 to return a file and the FBI showed up and said you've just
15 been indicted under this act for stealing our files.

16 What seems to me to be missing here is evidence
17 that the actors who are the defendants acted with some sort
18 of a criminal or unlawful intent. You have presented
19 evidence that in your view she has, Shibanov, accessed the
20 files in a way that in your view exceeded her access and
21 you've suggested that Mr. Seikaly has the documents that she
22 obtained. But where is the evidence that when that conduct,
23 if it happened, that when it happened, either of them acted
24 with some sort of an unlawful intent or state of mind?

25 MR. BIGELOW: Well, if you look at Exhibit 2

1 attached to the reply brief, Your Honor, paragraph 10, it
2 indicates the credit union's computer system, including all
3 e-mail messages created, sent or received on the system, are
4 the credit union's property. It is still the property of the
5 credit union. It is not Ms. Shibarov's to give to anybody
6 else.

7 THE COURT: I get that, but I mean let me give you
8 just a simple hypothetical to make the point.

9 This pen I'm holding up belongs to the
10 United States government, but when I walk around my chambers
11 during the day and I'm working on stuff sometimes I stick
12 these things in any pocket and I end up at home with a pen.
13 Gosh, I didn't mean to steal the United States government's
14 property, and even though everybody would agree the pen is
15 the property of the United States, I would like to think that
16 even the most aggressive prosecutor would not claim that I
17 acted with an unlawful intent simply because I possessed
18 property that belongs to the United States and not to me.

19 So what I'm trying to do is get myself over this
20 hurdle that -- of finding some sort of an unlawful intent to
21 go along with what you claim is unauthorized possession.

22 MR. BIGELOW: The difference in that set of facts
23 is you didn't take the pen, go home and give it to your
24 neighbor. That's what happened here.

25 THE COURT: All right. Let me give a new

1 hypothetical. The pen looks like a lot of other pens I have
2 at home. I take it home and my neighbor comes over says can
3 I borrow your pen, and I hand them the pen that is the
4 court's pen, but in my own mind I don't believe that I have
5 stolen it or taken it unlawfully.

6 I mean the -- I understand why in good faith you
7 may believe that this was an intentional effort to cheat your
8 clients by every actor on the other side of the V. What I'm
9 trying to focus on is the evidence to support that.

10 MR. BIGELOW: Well I think the document she did
11 sign, the fraud policy, paragraph 10, and Mr. Seikaly
12 received these documents and he was well aware of her
13 obligations to her employer, former employer.

14 THE COURT: What's the evidence of that?

15 MR. BIGELOW: The fact that he received these
16 documents too, Your Honor. They were provided in discovery.
17 He knew well enough that he was getting documents that he
18 wasn't entitled to.

19 THE COURT: What is the evidence of that? I mean,
20 I understand you saying that, but here we are on a
21 preliminary injunction. What's the evidence that, even by
22 way of affidavit at this point, that Mr. Seikaly actually
23 reviewed the credit union's policies when they were produced
24 during discovery, was aware of them, and was aware of them at
25 the time Ms. Shibarov allegedly delivered documents to him?

1 MR. BIGELOW: Well, I think the problem with
2 Mr. Seikaly's position right now is he hasn't come forward in
3 the -- I think we have shown a prima facie case here,
4 Your Honor, which would indicate the Court should grant the
5 preliminary injunction. We haven't received any
6 countervailing evidence to the contrary as to what his intent
7 actually was. There is nothing here. There are legal
8 arguments, but there are no affidavits, no declarations.

9 THE COURT: What is the prima facie evidence of bad
10 intent? I will -- for the sake of this question I will
11 assume that you have -- if we use the term prime facie,
12 whatever that means, but you have presented evidence of
13 wrongful possession. For the purposes of this question I'm
14 willing to make that assumption. What is the evidence that
15 goes to anybody on the other side of the V's intent?

16 MR. BIGELOW: Well, Your Honor, as set forth in the
17 amended complaint, Ms. Brown's declaration, and Mr. Seikaly's
18 obtaining of the documents, he knows they are documents that
19 certainly anybody would know but they are not documents of
20 Ms. Shibanov's, they are documents of the credit union.

21 And he certainly knew, when he was able to get the
22 employee policies, review those -- and I'm sure he thoroughly
23 did review those -- he knew he was getting documents that his
24 client wasn't entitled to keep. They all have to do with
25 customer information, private social security numbers. I

1 think it is incomprehensible to think that he thought he was
2 legally getting these documents. And when he was questioned
3 on where he got them, all he says is well, I legally obtained
4 them. And when questioned some more, it has been, well, it's
5 privileged, it is attorney-client privilege and I don't have
6 to produce it, and that's simply not true. We don't have any
7 countervailing evidence to rebut what's before the Court.

8 THE COURT: Anything else? Oh, let me ask you
9 this, Mr. Bigelow. Mr. Collier has indicated that with
10 respect to his clients, he would agree to the entry of an
11 order that says if and to the extent they received documents
12 from Ms. Shibarov that were obtained by her exceeding her
13 access, he will put those documents in a secure file and not
14 disseminate them or make any use of them other than using the
15 three documents that are already part of the publically
16 available Macomb County Circuit Court record and sharing them
17 with his retained counsel, namely, Mr. Collier.

18 Do you want me -- if I were to decline to enter the
19 full scope of the injunction that you request, would you want
20 me to enter the type of order that I just proposed?

21 MR. BIGELOW: I don't believe it would be
22 appropriate, Your Honor. First of all those three documents,
23 they are in the record. I --

24 THE COURT: Hold on. Let me -- are you saying you
25 would prefer that I -- for the sake of my question, I want to

1 be real clear about this. Assume for the sake of this
2 question that I will not enter the injunction of the scope
3 that you are asking. If that were to be my decision, would
4 you want me to enter the injunction that Mr. Collier and I
5 were discussing?

6 MR. BIGELOW: No, and that was one of the issues I
7 was going to cover.

8 THE COURT: Okay.

9 MR. BIGELOW: But I don't think there should be any
10 further sharing of the documents with counsel. Those three
11 documents that are in the record, they are out there, I
12 acknowledge that Mr. Seikaly is going to be -- his attorneys
13 already have those. But we are talking about private and
14 confidential records potentially involving hundreds of
15 customers, board members, employees. There shouldn't be any
16 further sharing of the documents. That's just another --

17 THE COURT: What if I added into this order that I
18 am discussing that the documents can be shared with counsel
19 and counsel shall make no use of them other than within this
20 litigation, and if they are used in this litigation involved
21 with the court they should be filed under seal?

22 MR. BIGELOW: I just don't think that's what the
23 Court should do, Your Honor. They're my client's -- it is my
24 client's property, Your Honor. They should get it back.

25 THE COURT: How can -- how could I conceivably

1 prevent -- again, let me stop you for a second. For the sake
2 of this question, I want you to assume I'm not going to order
3 them to give it back, just for the sake of this question.
4 And so the question is I'm throwing out a potential offer to
5 you, I'm saying your clients may not get the full loaf but
6 I'm offering what could conceivably be, in my mind, a very
7 substantial level of protection for interests that could well
8 be legitimate by your client and I'm asking would you rather
9 get nothing or what I'm offering?

10 MR. BIGELOW: And this is a hypothetical?

11 THE COURT: The hypothetical is I decide I'm not
12 going to enter the scope of the injunction that you have
13 asked for, so that ship has sailed in my hypothetical, and so
14 now your two choices are nada, nothing, or what I have
15 proposed in discussions with Mr. Collier. Would you rather
16 have the nothing or the what I have discussed with
17 Mr. Collier?

18 MR. BIGELOW: Well, certainly if I had to choose, I
19 would not want the nothing situation. But, again, it is my
20 client's property, Your Honor. They should get them back.

21 And I guess the main remaining point I would make
22 on that issue is they had an opportunity to take the
23 documents they thought were relevant in the state court case
24 and use them. They picked three documents, they used them.
25 There are potentially all of these other records out there

1 that they have no use for. They are my client's records and
2 it is my client's property. They should get the property
3 back.

4 You touched on the conversion issue, Judge, and I
5 haven't fully researched the issue in a while, but what
6 sticks out in my mind is the statute and the case law does
7 indicate that any unlawful act of dominion or control over
8 another's property is conversion, and I think that's what we
9 have here.

10 THE COURT: Isn't conversion an intentional tort?

11 MR. BIGELOW: Yes, it is, it is. A few weeks ago I
12 did look at a -- it was actually an opinion from a judge in
13 circuit court I believe, but it was ruled that it was an
14 intentional tort and it certainly is.

15 I have nothing further, Judge.

16 THE COURT: Okay. Thank you.

17 MR. BIGELOW: Thank you.

18 THE COURT: Mr. Collier, any last thoughts?

19 MR. COLLIER: Nothing further, Judge. Thank you.

20 THE COURT: Mr. Collier, how would you describe
21 this universe of documents, what terminology would be the way
22 to -- there are the -- I want to make sure I have this list.
23 What are the three documents that are part of the Macomb
24 Circuit record?

25 MR. COLLIER: There is the roster which includes

1 social security numbers, there is a management action report,
2 and there is a response to a state agency's investigation.
3 And then it is alleged that Mr. Seikaly has other documents
4 that Ms. Shibanov obtained from the credit union and that
5 were not produced by the credit union in discovery.

6 I think that's the best I can do on that one.

7 THE COURT: Okay.

8 MR. BIGELOW: Your Honor, if I may interject?

9 THE COURT: Please.

10 MR. BIGELOW: The three documents are set forth in
11 my brief at Exhibit 11 attached to Ms. Brown's declaration.

12 THE COURT: That's very helpful. Thank you.

13 Okay. Mr. Collier, you are welcome to say
14 anything, but I think you have answered my questions.

15 MR. COLLIER: Okay. Thank you.

16 THE COURT: You know what? What I want to do is
17 take a short ten-minute break, and then I'm going to come
18 back and I will give you an oral ruling, and I want to talk
19 about next steps in this case. So let's take a short break
20 and we will reconvene.

21 MR. BIGELOW: Thank you, Your Honor.

22 (Court recessed at 10:33 a.m.)

23 — — —

24 (At 10:51 a.m. Court reconvenes, Court and counsel
25 present.)

1 THE CASE MANAGER: All rise. Court is back in
2 session.

3 THE COURT: All right. One of the things that I
4 wanted to look at and I did very briefly during the break and
5 I don't have an answer to is whether I have subject matter
6 jurisdiction over the claims that are asserted against
7 Mr. Collier's clients. And I want to think out loud with you
8 and I'm going to ask you to submit argument on this point.

9 It is my understanding from the discussion with
10 Mr. Bigelow, that Count 1, the violation of the Computer
11 Fraud and Abuse Act, is asserted against Ms. Shibanov. Is
12 that correct, Mr. Bigelow?

13 MR. BIGELOW: That is correct, Your Honor.

14 THE COURT: And it is further my understanding that
15 the conduct underlying that count occurred in 2013. Is that
16 correct, Mr. Bigelow?

17 MR. BIGELOW: I believe so, yes.

18 THE COURT: I'm looking at paragraph 14 of your
19 amended complaint. It says on January 29, 2013, at
20 11:47 p.m.

21 So am I correct when I say that the conduct
22 underlying the federal claim in Count 1 occurred in 2013?

23 MR. BIGELOW: Yes, Your Honor.

24 THE COURT: And it looks like the violations -- the
25 state law violations against Mr. Collier's clients all

1 occurred in litigation that was filed in 2015; is that
2 correct?

3 MR. BIGELOW: Yes, Your Honor.

4 THE COURT: All right. So the basis of my original
5 jurisdiction over the case is the claim in Count 1, the one
6 federal claim, so that would be federal question
7 jurisdiction, there is not diversity jurisdiction because the
8 parties are from Michigan; is that correct? At least your
9 client would be a Michigan corporation; is that correct?

10 MR. BIGELOW: Yes, they are.

11 THE COURT: And Mr. Seikaly is a Michigan citizen;
12 is that correct, Mr. Collier?

13 MR. COLLIER: Yes.

14 THE COURT: So it doesn't appear that there is
15 diversity jurisdiction.

16 So the question as I'm trying to understand it is
17 where there is a single federal claim against one defendant
18 and a number of state law claims against the other
19 defendants, is there some basis for me to have subject matter
20 jurisdiction over the defendants who are named only in the
21 state law claims.

22 I did a very short amount of research, just barely
23 scratched the tip of the iceberg here, and it looks to me as
24 if this is addressed in 28, United States Code, Section 1367,
25 which on a very quick read appears to indicate to me that

1 under a circumstance like this I would have supplemental
2 jurisdiction over state law claims if those claims were -- if
3 they formed part of the same case or controversy under
4 Article III of the United States Constitution as the single
5 federal claim.

6 First of all, I'm not sure that's the right test.
7 Again, I did two minutes of research on the break. If that's
8 the right test, it is not clear to me that would be satisfied
9 here that incidents occurring in 2013 would be part of the
10 same case or controversy as incidents occurring in 2015 and
11 2016. I don't mean to prejudge the question, I merely mean
12 to ask the question. But because subject matter
13 jurisdiction, I have an obligation to look at that first and
14 foremost before I do anything, what I would ask is for
15 supplemental submissions from each of you on the question of
16 whether I have supplemental jurisdiction over the claims
17 against Mr. Seikaly and his firm that are asserted in the
18 first amended complaint.

19 The second and related question on jurisdiction is,
20 assuming that Section 1367(a) is satisfied and I have
21 supplemental jurisdiction, the next question is should I
22 decline to exercise that jurisdiction on one of the bases set
23 forth in Section 1367(c), and you should -- I would ask each
24 of you to address that.

25 Mr. Collier talked about his view of the novelty or

1 complexity of the conversion claim. That could conceivably
2 be a basis to decline supplemental jurisdiction under
3 1367(c)(1).

4 So that's a preliminary matter that absolutely
5 needs to be addressed before I have the authority to enter
6 any sort of an order.

7 How long do you folks need to file those
8 supplements? I don't want to jam anybody here.

9 MR. BIGELOW: If we could have a couple weeks,
10 Judge.

11 THE COURT: Is two weeks enough?

12 MR. BIGELOW: Yes.

13 THE COURT: I don't mind three.

14 MR. COLLIER: I think three might be nice if that
15 would work.

16 THE COURT: All right, three. And would you file
17 simultaneously?

18 MR. BIGELOW: Sure.

19 MR. COLLIER: Yes, that's fine with me.

20 The only question I would add is, our response to
21 the new complaint is due I think September 22nd, so there
22 might be a question of whether we extend that based on this
23 briefing.

24 THE COURT: Yes, I will extend that to 14 days
25 after I enter an order on the question of subject matter

1 jurisdiction.

2 All right. Now, we have put in a lot of time and
3 effort on the question of the injunction, and what I want to
4 do with you, I'm not going to enter any sort of an order
5 unless and until I'm confident that I have subject matter
6 jurisdiction to act. But I want to tell you what I will do
7 if I conclude that I have subject matter jurisdiction so that
8 we can keep this matter moving forward.

9 If I conclude that I have subject matter
10 jurisdiction, I am going to deny Mr. Bigelow's request for
11 the full scope of the injunction prayed for in his motion,
12 but I will enter an order with restrictions on the clients
13 that Mr. Collier represents.

14 The order that I will enter will provide as
15 follows: It will indicate that Mr. Seikaly and his firm have
16 obtained from Ms. Shibanov documents that she obtained from
17 the credit union and that were not produced by the credit
18 union during discovery. Those documents fall into two broad
19 categories; the three documents that were filed in the state
20 court and that Mr. Bigelow helpfully directed me to, the
21 documents that are a part of docket entry 7-12 and that run
22 from page ID 78 through page ID 89. With respect to those
23 three documents, Mr. Collier's clients may utilize those
24 documents in the state court litigation that is currently
25 pending on appeal in the Michigan Court of Appeals. I don't

1 know what the Court of Appeals case number is, but the
2 Macomb County Circuit Court number was 2015-0524-CZ.

3 So those three documents that I just identified,
4 Mr. Collier's clients can continue to utilize in the state
5 court proceedings now in the Court of Appeals.

6 With respect to the remainder of the documents that
7 fall within this set of documents, Mr. Collier's clients may
8 disclose those documents to Mr. Collier and his law firm
9 solely for the purpose of use in defending the claims in this
10 action, and neither Mr. Collier nor his clients may make any
11 other use of the remainder of the documents other than for
12 use in this litigation.

13 Those are the only two exceptions to the
14 prohibition that I would put in place by agreement of
15 Mr. Collier. Other than those two exceptions, the documents
16 that I have described, being those that Mr. Seikaly and his
17 firm may have received from Ms. Shibanov but not during
18 discovery, those documents shall be stored in a secure
19 location within the Seikaly firm, and not disclosed to
20 anybody or used for any purpose other than as I have
21 indicated.

22 That would be the order that I would enter, again,
23 by virtue of Mr. Collier's agreement to do that.

24 Here is how I would see the four injunction factors
25 here. With respect to the first factor, a likelihood of

1 success on the merits, I am not persuaded by the submissions
2 and evidence by Mr. Bigelow that there has been a likelihood
3 of success on the merits established with respect to the
4 claims against Mr. Collier's clients, at least at this point.

5 The main thing that is missing, in my view, from
6 this record today is any evidence going to the state of mind,
7 the level of intent, or the level or type of knowledge that
8 Mr. Seikaly and his law firm may have had when they received
9 or possessed the documents in question here.

10 I haven't seen any evidence that they acted with
11 any sort an intent to defraud or cheat, any evidence that
12 they knew that the documents had been stolen, or any evidence
13 that even as of today they should be on notice that the
14 documents are stolen as opposed to documents that were
15 properly possessed by Ms. Shibanov.

16 With respect to the second factor, would there be
17 irreparable harm to the credit union in the absence of the
18 requested injunction. In light of the order that I am going
19 to enter by virtue of Mr. Collier's agreement I think there
20 would be no irreparable harm absent the additional injunctive
21 relief that Mr. Bigelow seeks here. The order that I will
22 enter, it seems to me, is more than sufficient to protect any
23 legitimate privacy interest that may be at stake for the
24 credit union's employees and officers whose information is
25 contained in these documents.

1 With respect to the harm to others factor, I don't
2 think there is a particularly relevant factor here. I don't
3 think it cuts strongly one way or another.

4 With respect to the public interest and assuring
5 compliance with the integrity of documents and data, I think
6 that is sufficiently protected by the injunction that I will
7 enter by virtue of Mr. Collier's order.

8 And the last factor, which would kind of be a
9 balancing of the harms, I think that any injunctive relief
10 beyond that which I would -- which I have ordered I think
11 would unfairly impair Mr. Seikaly's ability and his firm's
12 ability to defend themselves in this case. I think that
13 requiring a full-sale return of the documents at this early
14 point without allowing access to his counsel and his firm's
15 counsel would impair his ability to defend himself here.

16 So that's how I see the balance playing out, and if
17 I'm convinced that I have subject matter jurisdiction I would
18 enter an order and will enter an order along the lines I have
19 indicated.

20 I want to talk further, but any questions about
21 what I would rule if I find I have subject matter
22 jurisdiction, Mr. Bigelow?

23 MR. BIGELOW: I just had one comment or question,
24 Judge.

25 THE COURT: Please.

1 MR. BIGELOW: Would the Court be willing to enter
2 an order providing that if these documents, the unidentified
3 documents, are going to be used, produced in court, that they
4 be supplied under seal?

5 THE COURT: Yes. Thank you for reminding me of
6 that. In fact I think I had mentioned that but I, as I do so
7 often, I lost track of it and I appreciate you reminding me
8 of that.

9 John, will you make a note of that?

10 THE LAW CLERK: Yes.

11 THE COURT: All right.

12 Anything else, Mr. Bigelow, questions or comments
13 at this point?

14 MR. BIGELOW: No, Your Honor.

15 THE COURT: Mr. Collier?

16 MR. COLLIER: Nothing from me. Thank you.

17 THE COURT: All right. Let me change gears here
18 and talk about what happens moving forward.

19 It seems to me there has got to be a creative
20 solution to this situation rather than, in the old parlance,
21 making a federal case out of this. This seems to me to have
22 the potential of throwing a lot of time and money at
23 something that is going to end in a spot where nobody is
24 happy or satisfied. It seems to me that some sort of
25 creative out-of-the-box thinking would solve these problems.

1 Mr. Bigelow's clients want their documents back.
2 Totally understandable. Mr. Collier's client wants to hang
3 on to them at least as long as necessary. It seems to me
4 that some sort of creative solution of maybe, I don't know,
5 giving the documents to somebody to hold in escrow at some
6 point, some sort of settlement that puts them there and then
7 at some point when Mr. Collier's clients reach some level of
8 comfort they are then given back to Mr. Bigelow, but they are
9 held by some third party so that no use can be made of them
10 and they are effectively taken out of circulation.

11 That's the type of thinking that seems to me to be
12 important here. I can't see this case ending well for either
13 side in this respect.

14 To go through, all the way through discovery and a
15 trial, it seems to me the best-case scenario, Mr. Bigelow,
16 for your side would be some sort of final judgment in which
17 you get return of the documents and some damage number. As I
18 sit here today, that damage number seems to me -- I'm having
19 trouble coming up with a big number. And with respect to the
20 availability of attorneys fees, there would be a real
21 question about whether fees would be available and, if so,
22 how much would be properly awarded given what's at stake and
23 what ultimately may be awarded by way of damages.

24 And on Mr. Collier's side, is this really a case
25 where your clients or their insurance carrier wants to

1 litigate and throw a ton of money at something? Even if you
2 hit a grand slam and they said you didn't do anything wrong
3 and you get to keep the documents, I don't know, it just
4 seems to me that this case cries out for creative thinking,
5 creative thinking that finds a way to accommodate two
6 legitimate goals.

7 I respect and appreciate, Mr. Bigelow, your
8 client's interest in getting those documents out of
9 circulation and away from the Seikaly firm. I respect
10 appreciate Mr. Collier's interest in wanting to assure that
11 those documents are available at least for the purpose of
12 defending the claims. But if we took the air out of the
13 case, maybe -- out of this case, maybe there is a way to get
14 to the bottom line and to get to something that accommodates
15 both these goals without you having to brief really difficult
16 questions of federal jurisdiction and the like.

17 So what I want to ask at this point is, does it
18 make sense to take a breather and have you folks meet with
19 some facilitator who could help think creatively and bring
20 the parties together?

21 Mr. Bigelow, your reactions on that?

22 MR. BIGELOW: Well, first of all, we'd need to get
23 Ms. Shibarov served, but I understand the Court's thought on
24 mediation. But the problem my client has is they really
25 don't want to do anything until they get their documents

1 back, Your Honor. It's --

2 THE COURT: Well, put yourself in your client's
3 position, and what your clients are going to hear today is
4 this stickler up in Flint wearing a black robe just ordered
5 me to brief a really complicated question of supplemental
6 federal court jurisdiction, and my guess is it will cost you,
7 client, X dollars, and he's not giving us our documents back
8 now. So we could try to have a discussion with a talented,
9 forceful, experienced facilitator who can lean on Mr. Collier
10 to find a creative way to get these documents out of
11 circulation, or our options are we go the full length of this
12 case in district court without our documents, or I file an
13 expensive appeal to the Sixth Circuit because I do have the
14 right to file an interlocutory appeal from an order with
15 respect to an injunction and so, client, here's your options,
16 and, client, let me tell you -- you will have to tell them
17 what you think the Sixth Circuit would do if you were
18 inclined to appeal from the type of order that I have
19 entered, you will have your own views, whatever.

20 But, in other words, it seems to me that if the
21 client's reaction is we don't want to facilitate because we
22 want our documents back, I would respectfully suggest to the
23 client that that's entirely backwards. That the path to
24 conceivably getting the documents back is some sort of
25 facilitation where somebody creatively finds a way to get the

1 documents back at some point. Because absent that I have
2 indicated I'm not going to order them returned until the end
3 of this case, and so the only choice absent a facilitation
4 would be a Sixth Circuit appeal where the Sixth Circuit is
5 going to be told Leitman entered an order precluding Seikaly
6 from doing anything with the documents but it was abuse of
7 discretion not to order more.

8 So it seems to me that facilitation is exactly the
9 way to get what your clients want, if there is a reasonable
10 way. I say that again with the greatest respect, and I don't
11 represent clients anymore so that's one of the good parts of
12 my job, I don't have to explain things like this to them, but
13 that's my thinking.

14 Mr. Collier, what are your thoughts on whether we
15 do this?

16 MR. COLLIER: I think that makes a lot of sense,
17 and I think that might be the way to solve this case. I need
18 to get my client's consent, but I really think it makes a lot
19 of sense.

20 MR. BIGELOW: Your Honor, I would just like to get
21 some discovery and get the documents through discovery and
22 then perhaps we could consider facilitation. I think that's
23 the more appropriate approach.

24 THE COURT: All right. So what I will -- first of
25 all, I'm not going to force anybody to facilitate if they

1 don't want. So let me suggest this: Would you, as the first
2 order of business, prepare and file the supplemental briefs.
3 Because the first thing I've got to do before I can exercise
4 any authority is to be comfortable that I have the authority.

5 So let's, step one, file your briefs, I will review
6 them, and I will do it -- I will try to make it a priority,
7 and to get a ruling out on whether I have jurisdiction.

8 If I have jurisdiction, the next thing you are
9 going to get from me is an order along the lines that I just
10 described addressing the restrictions that I would put on
11 Mr. Seikaly's use of the documents, and I use Mr. Seikaly to
12 refer to his firm and the defendants represented by
13 Mr. Collier.

14 Then at that point, Mr. Bigelow, if you wanted to
15 send a discovery request to Mr. Collier that said -- or to
16 his clients that said -- or to Ms. Shibanov, produce all the
17 documents that you obtained from the credit union other than
18 through discovery, maybe that could be one focused set of
19 discovery, and then you can at least see what's there and
20 then decide if you think facilitating makes some sense.

21 Does that sound like at least a reasonable step for
22 moving forward?

23 MR. BIGELOW: Absolutely, Your Honor.

24 THE COURT: Okay. Mr. Collier, does that sound
25 okay to you?

1 MR. COLLIER: Yes.

2 THE COURT: All right. Okay. Then did we say
3 three weeks on the briefs?

4 MR. COLLIER: Yes.

5 THE COURT: Is that the 27th? That's a Wednesday?
6 Does that work, e-filing on the 27th simultaneously,
7 addressing the question of whether I have jurisdiction?

8 Now, if I have missed the boat and 1367(a) and (c)
9 are not the relevant sources of authority here, please feel
10 free to direct me to the right ones. Again, I did less than
11 ten minutes of research on the short break. I was just
12 throwing those up as possible starting points.

13 The ultimate question to address is whether I have
14 subject matter jurisdiction over the claims against
15 Mr. Collier's clients and, if I do, do I also have the
16 discretion to decline to assert that jurisdiction? And if I
17 have that discretion to decline, should I decline? Those are
18 the questions that would be helpful.

19 Anything else today, Mr. Bigelow, before we
20 adjourn?

21 MR. BIGELOW: Nothing further, Your Honor.

22 THE COURT: Mr. Collier?

23 MR. COLLIER: Nothing. Thank you.

24 THE COURT: Okay. Thank you both for your briefing
25 argument and for taking the time to join me up here this

1 morning. I will look forward to your supplemental briefs,
2 and we will stay in touch.

3 MR. BIGELOW: Thank you.

4 MR. COLLIER: Thank you, Your Honor.

5 (Proceedings concluded at 11:16 a.m.)

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CERTIFICATION

I, Robert L. Smith, Official Court Reporter of the United States District Court, Eastern District of Michigan, appointed pursuant to the provisions of Title 28, United States Code, Section 753, do hereby certify that the foregoing pages comprise a full, true and correct transcript taken in the matter of UKRAINIAN FUTURE CREDIT UNION vs. SEIKALY, et al., Case No. 17-11483, on Wednesday, September 6, 2017.

s/Robert L. Smith
Robert L. Smith, RPR, CSR 5098
Federal Official Court Reporter
United States District Court
Eastern District of Michigan

Date: 09/12/2017

Detroit, Michigan